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No. 08-660

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK, MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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STATUTES INVOLVED

28 U.S.C. § 2107(a):

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(b):

> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

STATEMENT OF THE CASE

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit.

A. INTRODUCTION

A notice of appeal must generally be filed within thirty days after entry of a judgment. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). There is an exception to this rule: where the United States is a party, the time as to all parties is sixty days. 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B).

In this case, Petitioner filed his notice of appeal fifty-four days after entry of judgment. The issue presented to this Court is whether the United States (the "Government") is a "party" to an action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq*., for purposes of determining the relator's time to appeal, where the Government has declined to intervene and has not participated in the action.

Here, the Second Circuit held that the need to intervene is inconsistent with the characteristics of a party to litigation. In so holding, the Second Circuit joined the Tenth Circuit (*United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978), *cert. denied*, 444 U.S. 839 (1979)) in holding that where the Government has not intervened in the action and has not exercised any of its rights granted under the FCA, the Government's name in the caption is a mere statutory formality which does not make the Government a party. Therefore, these courts hold, the thirty-day limit applies.

The Third, Fifth, Seventh and Ninth Circuits have held that the Government is a party to every FCA action brought by any relator, without regard to whether the Government has intervened or otherwise participated in the action. Those Courts hold that the sixty day limit applies because it avoids confusion. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297 (3d Cir. 2008); *United States ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997).

There is no dispute here that both the Government and the relator are real parties in interest in a suit under the FCA, whether the Government intervenes and conducts the action, or declines intervention and the relator conducts the action. That term of art, "real party in interest," must be distinguished from the identity of a "party" for purposes of determining the relator's time to appeal. Indeed, in this case, there were three separate claims alleged in the complaint to which the Government was clearly not a party. Pet. App. 16a – 43a.[1]

The definition of "party" is a flexible one. The Government may be a "party" to an FCA action for some purposes and not for others. Where, though, as here, the Government has declined to intervene, all parties are aware of the Government's decision, the Government has taken no other action or filed any other papers with respect to Petitioner's FCA action, and the Government had no right, absent intervention, to appeal from the district court's judgment dismissing the complaint for failure to state a claim, the Government is not a party for purposes of determining the relator's time to take an appeal.

Where the Government is not a party, a notice of appeal must be filed within thirty days of the entry of judgment. The notice of appeal in this case, filed fifty-four days after entry of judgment, was untimely. As a result, the Second Circuit correctly determined that it lacked jurisdiction to hear Petitioner's appeal.

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1. "Pet. App." refers to Petitioner's Appendix filed in this Court with the petition for a writ of certiorari.

The Circuit Court decisions on which Petitioner relies applied the sixty-day exception to the generally applicable thirty-day rule under the guise of a "literal interpretation" of the Rule. Their interpretation is no more "literal" than is that of the Second and Tenth Circuits' interpretation that the thirty-day rule applies. Moreover, those courts failed to recognize that where, as here, the Government is an involuntary party to an action which it did not commence and in which it has not participated, there is no reason to hold that the Government is a party for purposes of determining the relator's time to appeal from a judgment dismissing all four claims alleged in his complaint.

Indeed, the Fifth Circuit has recognized that the Government is not necessarily a "party" for all purposes. *Searcy v. Phillips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997). However, that court erred in *Russell* when it held that the Government is always a party for purposes of determining a relator's time to appeal in an FCA action.

The only reason that there is any confusion on this score is because some Circuit Courts have been sympathetic to litigants and their attorneys who missed the filing deadline and have held, incorrectly, that the Government is always a party to an action under the FCA for purposes of determining the relator's time to appeal. The confusion ends once this Court affirms the Second Circuit's decision and determines that where the Government has taken no action other than to decline to participate in an FCA action, the Government is not a party for purposes of determining the relator's time to appeal.

B. *QUI TAM* ACTIONS UNDER THE FCA

A person who submits a "false or fraudulent claim for payment or approval" to the Government is liable for treble damages and a civil penalty. 31 U.S.C. § 3729(a)(1). Under 31 U.S.C. § 3730(a), the Attorney General may bring a civil action to recover on a false claim. Alternatively, a private person may bring a civil action "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1).

The statute goes on to provide that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.* The consent of the Attorney General is not required for court-ordered dismissal. *Minotti v. Lensink*, 895 F.2d 100, 103-104 (2d Cir. 1990).[2]

After the private person commences an FCA action by filing a complaint under seal, 31 U.S.C. § 3730(b)(2), the complaint and any material evidence which the person possesses must be served on the Government. Within sixty days (plus any extensions) after service, the Government must decide whether it intends to proceed with the action. 31 U.S.C. § 3730(b)(4).

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2. Despite Petitioner's assertion to the contrary, Pet. Brief at 7, one court has held that the Attorney General's consent is also not required for a voluntary dismissal where the Government has declined intervention. *Compare United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994) ("the consent provision contained in § 3730(b)(1) applies only during the initial sixty-day (or extended) period") *with Searcy*, 117 F.3d at 157 (FCA grants the Government "the power to withhold consent to voluntary settlements.").

If the Government elects to proceed with the action, "the action shall be conducted by the Government." 31 U.S.C. § 3730(b)(4)(A). If the Government "declines to take over the action, . . . the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B).

If the Government conducts the action, the person who brought the action has "the right to continue as a party to the action," subject to certain limitations. 31 U.S.C. § 3730(c)(1). If the Government elects not to proceed with the action, its later intervention will only be allowed by the court "upon a showing of good cause." 31 U.S.C. § 3730(c)3) Furthermore, even if such later intervention is permitted, the status and rights of the person initiating the action may not be limited. *Id.*

If the Government declines to take over the action, then, unlike a party to an action, it is only entitled to receive copies of pleadings upon special request. *Compare* Fed. R. Civ. P. 5(a)(1)(B) (pleadings filed after the original complaint "must be served on every party") *with* 31 U.S.C. § 3730(c)(3) ("[i]f the Government so requests, it shall be served with copies of all pleadings filed. . . .").

Of course, the Government is entitled to most of the recovery in an FCA action. This result, however, is not sufficient to confer party status on the Government in an FCA action in which it has neither intervened nor participated in any way.

C. PROCEDURAL HISTORY

Petitioner commenced this action *pro se*, alleging four separate claims, only one of which concerned the FCA. (JA[3] 38) Although it is not entirely clear, the Circuit Court described Petitioner's FCA claim against Respondents as follows:

> Eisenstein contends that because non-resident employees are able to deduct this fee as an expense for federal income tax purposes, their taxable income is less than it might otherwise be, and in this way, the City is depriving the federal government of tax revenue.

Pet. App. 3a.

As required by 31 U.S.C. § 3730(b)(2), petitioner filed his complaint with the United States District Court for the Southern District of New York *in camera* and served it upon the United States Government. The Government, pursuant to 31 U.S.C. § 3730(b)(4)(B), timely notified the district court that it declined to intervene in the action. The Government's notice indicates that copies were sent to each of the plaintiffs named in the complaint. (JA 46-48).

The district court entered an order unsealing the complaint and directing its service upon Respondents. (JA 49-50) Thereafter, petitioner served a copy of the complaint upon Respondents and exercised his right to conduct the action pursuant to 31 U.S.C. § 3730(c)(3).

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3. "JA" refers to the Joint Appendix filed in this Court.

The District Court dismissed the complaint for failure to state any claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). (Pet. App. 16a–43a) Fifty-four days after entry of judgment, petitioner filed a notice of appeal.

The United States Court of Appeals for the Second Circuit, in a *sua sponte* Order dated December 26, 2006, directed the parties and the Government to brief the question whether petitioner timely filed his notice of appeal. (Pet. App. 4a-5a) Specifically, the Circuit Court requested briefing on whether the thirty day time limit in Fed. R. App. P. 4(a)(1)(A) for filing a notice of appeal, or the sixty day time limit in Rule 4(a)(1)(B), applicable where the Government is a party, applies in an action under the FCA where the Government has declined to intervene or take any other action.

Respondents submitted their Brief advocating the thirty-day limit. Respondents based their motion on the additional ground that a non-attorney litigant may not prosecute an FCA action *pro se*.[4] The Government submitted a Brief as *amicus curiae* which also advocated the 30-day time limit. The Circuit Court appointed *pro*

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4. The court did not reach this issue. In the event that this Court were to reverse the Second Circuit on the issue raised here by Petitioner, the Second Circuit would likely affirm the District Court's dismissal on the separate ground that a non-attorney litigant may not prosecute an FCA action *pro se*. (Pet. App. 3a n.1) *See United States ex rel. Mergent Services v. Flaherty*, 540 F.3d 89 (2d Cir. 2008). *See also Lu v. Ou*, 368 F.3d at 775-776. If the Government is a party, and it has not appeared by its own attorney, then it must be represented by the relator, because there is no one else in the action except the defendant.

bono counsel to represent Petitioner solely for the purpose of briefing the two issues raised by the motion.

Petitioner *pro se* and Respondents also submitted briefs on the merits of the appeal. At no time did the Government move to intervene, nor did the Government submit any papers other than the Brief requested by the Circuit Court and the Government's Notice of Election to Decline Intervention. (Pet. App. 5a)

D. THE ORDER OF THE CIRCUIT COURT OF APPEALS

In a unanimous opinion issued on August 19, 2008 (Pet. App. 1a), the Second Circuit dismissed the appeal as untimely. *United States ex rel. Irwin Eisenstein v. City of New York*, 540 F.3d 94 (2nd Cir. 2008). The court held that, in an action under the FCA in which the United States has declined to intervene or take any other action, the United States is not a party for purposes of Fed. R. App. P. 4(a)(1) and, therefore, the thirty day time limit for filing a notice of appeal applies. (Pet. App. 2a)

The court held that "[a]s used in Rule 4(a)(1), the word 'party' refers to the person participating in the proceedings with control over litigation." (Pet. App. 8a) Therefore, the Court concluded, the Government's status as the real party in interest in an FCA suit did not make the Government a "party" where the Government has declined to intervene and played no role in the court proceedings.

The court wrote that the term "real party in interest" "is a term of art used in the rules of procedure,"

referring to Fed. R. Civ. P. 17(a)(1), which requires that actions be brought in the name of the "real party in interest". (Pet. App. 10a) The Court concluded that "[w]e therefore regard the omission of 'real party in interest' from [Fed. R. App. P.] Rule [4](a)(1)(B) as meaningful." *Id.*

Where the Government has not intervened in an FCA suit, the relator has the exclusive right to conduct the action. 31 U.S.C. §§ 3730(b)(4)(B), (b)(5) and (c)(3). The Government may subsequently intervene only upon a showing of good cause. 31 U.S.C. § 3730(c)(3). As the Second Circuit wrote, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Pet. App. 8a)

The court also noted, with reference to the Advisory Committee's Notes of 1946 to former Rule 73(a) of the Fed. R. Civ. P., that the intent underlying Rule 4(a)(1)(B) is to account for the "slow machinery of government." (Pet. App. 10a) The Court held that "this rationale is obviously inapplicable to the present case, where the Government has played no part in the underlying litigation other than to decline to participate in it." (Pet. App. 11a) Therefore, the Second Circuit correctly held, it lacked jurisdiction because Petitioner's notice of appeal, filed fifty-four days after entry of judgment, was untimely.

The Second Circuit agreed with the Tenth Circuit that the naming of the Government as a plaintiff "was merely a statutory formality," citing *Petrofsky*, 588 F.2d at 1329. (Pet. App. 15a) The court held that where, as

here, all parties are aware that the Government had declined to intervene, there is no need to allow more than the standard thirty days to take an appeal. (*Id.*)

This Court should affirm the Second Circuit's judgment and hold that the Government is not a party to an FCA action in which it has neither intervened nor taken any other action.

SUMMARY OF ARGUMENT

The parties do not dispute that under the FCA, the Government, together with the relator, are both real parties in interest. However, a real party in interest is not the same as a "party" for purposes of determining the relator's time to appeal from a judgment in an FCA action in which the Government has declined to intervene.

The Government may be a party for one purpose but not for another. The Government is not a party for purposes of determining a relator's time to appeal from a judgment in an FCA action dismissing the complaint for failure to state a claim where the Government has not intervened. Indeed, absent intervention, the Government has no right to appeal from the judgment in this case.

The rationale underlying Fed. R. App. P. 4(a)(1)(B), which grants the Government sixty days to take an appeal, is to allow for the slower-moving machinery of Government. The drafters of the rule believed that fairness dictated granting all parties the same sixty days. Here, where the Government had not right to appeal, the rule, and its reason, are not implicated.

Under the FCA, absent intervention, the Government's role is limited. In contrast to the rights granted to a party by the Federal Rules of Civil Procedure, the Government is not entitled to copies of pleadings after the initial complaint, except upon special request. The Government may not participate in discovery, except to receive copies of deposition transcripts and then, only upon request. The Government has no right at all to be served with discovery papers, written motions or most other notices. The Government may not withdraw or settle an action over a relator's objection, except after a hearing at which the relator may be heard.

The Government may not intervene in an FCA action after the initial period except upon a showing of "good cause." Holding that the Government is a party to an FCA action where it has not intervened would eliminate the statutory requirement that it show "good cause" prior to intervening, and would bestow rights and obligations upon the Government which are not otherwise provided for by the FCA. The requirement that the Government show "good cause" in order to intervene and conduct the action is not consistent with the rights of a party to litigation.

The relator's status as a party is derived from his standing as a partial assignee of the Government's claim. In a case where the Government has not intervened, dismissing the relator from the case ends the action. If the Government were a party, then it would necessarily have the right to continue the action, even without intervention. Nothing in the FCA would permit the Government to take over the action absent its intervention, either initially, or later for good cause shown.

Those circuit courts which have held that the Government is a party for purposes of determining a relator's time to appeal under Fed. R. App. P. 4(a)(1) – a jurisdiction-conferring rule – have incorrectly based their decisions on the convenience of the litigants, rather than upon the limited role that the Government plays in an FCA action in which it has not intervened. This is not a proper basis on which to decide federal appellate court jurisdiction.

The Second Circuit correctly held that it lacked jurisdiction to hear this appeal because the appeal was not taken timely.

ARGUMENT

WHERE THE GOVERNMENT HAS NEITHER INTERVENED NOR OTHERWISE PARTICIPATED IN A FALSE CLAIMS ACT SUIT, THE GOVERNMENT IS NOT A PARTY FOR PURPOSES OF FED. R. APP. P. 4(a)(1).

Whether any party to an action has thirty or sixty days to file a notice of appeal from a judgment depends upon whether the Government is a "party" for purposes of Fed. R. App. P. 4(a)(1). "The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). Here, as the Second Circuit held, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Pet. App. 8a)

A. The Government, Though A Real Party In Interest, Is Not A Party For Purposes Of This Appeal

This Court has not specifically addressed whether the United States is a party to an action under the False Claims Act for purposes of determining whether the thirty day or the sixty day rule of Fed. R. App. P. 4(a)(1) applies. However, this Court's holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), is instructive.

In *Stevens*, this Court was presented with the question "whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733." 529 U.S. at 768. But, before the Court could reach the main question, it first addressed whether the private individual had standing under U.S. Const. art. III to maintain the action at all where the Government had declined to intervene. The Court answered this threshold question in the affirmative, finding that the private individual was a partial assignee of the Government's claim.

The *Stevens* Court held:

> We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. [footnote omitted] Although we have

> never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits . . . – and also suits by subrogees, who have been described as "equitable assignees." . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

529 U.S. at 773-774 (citations omitted)

The decision in *Stevens* distinguishes between a "party" (who must have art. III standing to maintain a suit) and a "real party in interest," such as the Government, who may not even have appeared in the action. Had the Government been a party plaintiff to the litigation in *Stevens*, then there would clearly have been standing because the alleged injury in fact was indisputably sustained by the Government. 529 U.S. at 774 ("We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.").

The *Stevens* case would have been over if the Court had dismissed the relator. This fact alone demonstrates that the Government is not a party where it has neither intervened nor taken any other action in an FCA case.

Indeed, in *Stevens*, this Court noted that " the Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party.*'" 529 U.S. at 771-772 (citations omitted) (emphasis in original). Where, as here, the Government has not intervened and taken control of the suit, and a dismissal

of the relator would end the action, the only "party" in the action must be the relator, *i.e.*, the "complaining party." Because the Government is not a party, then a litigant has thirty, not sixty, days to file a notice of appeal.[5]

Under the FCA, a relator, as assignee, "effectively stands in the shoes of the government." *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743, 748 (9th Cir. 1993). The relator may stand in the shoes of the Government, but the relator is not the Government. *See Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)("*qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.")

This Court's holding in *Stevens* undermines one of the rationales of the Seventh Circuit's holding in *Ou*, 368 F.3d 773. In *Ou*, as the Second Circuit noted in its decision here on review, "the Seventh Circuit appears to have concluded that the United States must be a party to FCA actions because relators by themselves lack standing to sue. *Ou*, 368 F.3d at 775." (Pet. App. 14a) *Stevens* holds that relators do have standing to sue.

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5. In *Stevens*, this Court declined to express an opinion as to whether the FCA violates the Appointments Clause or the "take Care" Clause of Const. art. II, §§ 2 and 3, respectively. 529 U.S. at 778 n.8. Holding that the Government is an involuntary party to an action which it did not commence and in which it has not participated may cross the threshold of a constitutional violation.

Furthermore, the Fifth, Seventh and Ninth Circuits incorrectly equated the Government's status as the real party in interest in a False Claims Act action to status as a party for purposes of the Federal Rules of Appellate Procedure – even where the Government has neither intervened nor even appeared in the action. However, those Courts did not have the benefit of this Court's holding in *Stevens*. The standing analysis employed by this Court and the conclusion reached in *Stevens* demonstrate that the Government is not a party in an FCA action until it intervenes or takes some other affirmative steps. Even then, the Government is only a "party" for the limited purpose for which it appeared. *See also Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. __, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (assignee of claim has standing in federal court without naming assignor, even where assignee will pay over proceeds of litigation to assignor).

B. The Government Is Only A "Party" For the Limited Purpose For Which It Has Appeared In The Action

In *Martino v. Ortiz*, 484 U.S. 301, 304 (2002), this Court held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Here, the Government had no right to appeal the district court's dismissal of the complaint without first being granted leave to intervene. Consequently, at least for purposes of Rule 4(a)(1), in this case the Government is not a party.[6]

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6. Of course, if the Government's motion to intervene had been made and denied, then it may appeal from that adverse determination. *McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992).

Prior to the 1986 amendments to the FCA, once the Government declined to take over the action, it had no further right to enter the action. In enacting the 1986 amendments, Congress intended to grant the Government only a limited right to come into the action after the initial sixty day period, and delegated to the courts a gatekeeper function with respect to the Government's later intervention. The Senate Report for the 1986 amendments states:

> Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial period. The Committee recognizes that this limited opportunity for Government involvement could in some cases work to the detriment of the Government's interests. Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show "good cause for intervening, paragraph (2) provides that the court may allow the Government to take over the suit.

Senate Report (Judiciary Committee) No. 99-345 at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

The Court need not determine here what constitutes "good cause" for purposes of allowing the Government's intervention in an FCA action. It is clear that Congress intended to make the courts the gatekeeper for the Government's intervention, and provided a standard by which the Government's motion to intervene must be measured.

The existence of this standard distinguishes this case from the facts in *Devlin*, 536 U.S. 1. In *Devlin*, a class action, the Court held that nonnamed class members were "parties" for the limited purpose of taking an appeal from the approval of a settlement to which they objected at a fairness hearing. In rejecting the Government's proposal that nonnamed class members be required to seek intervention prior to taking an appeal, the Court took note of "the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal . . .." 536 U.S. at 12. The Court held that no purpose would be served by requiring intervention. Here, by contrast, Congress intended that the Government only have a limited ability to participate in the action after an initial declination, and set a standard for the courts to apply if the Government were to seek leave to come into the action later.

Additionally, in *Devlin*, the Court was concerned with the fact that the petitioner in that case had no ability to opt out of the settlement. *Id.* at 10-11. Here, unlike the situation in *Devlin*, the FCA expressly grants certain rights to the Government in connection with a settlement which allow the Government to protect its own interests without intervening. Section 3730(b)(1) provides, in

relevant part, that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Moreover, 31 U.S.C. § 3730(c)(2)(A) allows the Government to dismiss the action over a relator's objection on notice to the relator and grants the relator a right to a hearing. Section 3730(c)(2)(B) provides that "[t]he Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." All of these rights distinguish the Government in an FCA case from the unnamed class members in *Devlin*.

To be sure, Respondents do not contend that the Government can never be a party absent intervention. The question whether the Government is a party for purposes of an appeal if, *e.g.*, its motion to dismiss pursuant to 31 U.S.C. § 3730(c)(2)(A) is denied, is not before this Court. Our position here is that, on the facts of this case, the Government is not a party for purposes of determining Petitioner's time to appeal from the judgment dismissing all four of Petitioner's claims for relief. [7]

Significantly, the Fifth Circuit has held that the Government has no right to appeal where it had not intervened in an FCA action. *Searcy*, 117 F.3d 154 In *Searcy*, the Court wrote:

> In short, the [FCA's] structure distinguishes between cases in which the United States is

7. The Government is clearly not a party to the three of Petitioner's four claims which do not concern the FCA.

> an active participant and cases in which the United States is a passive beneficiary of the relator's efforts. When the government chooses to remain passive, as it has here, we see no reason to treat it as a party with standing to challenge the district court's action as of right.

117 F.3d at 156. In *Searcy*, the court held only that the Government, without intervening, may appeal from an order which overruled its statutory right to veto a settlement.[8]

The Fifth Circuit sought to distinguish its holding in *Searcy* from the Ninth Circuit's decision in *Haycock* (holding that the Government is a party for purposes of Fed. R. App. P. 4(a)(1)) by writing that "viewing the government as a party for the purposes of Rule 4(a)(1) does not compel us to treat it as a party for all appellate purposes." 117 F.3d at 156. *Searcy* cannot reasonably be reconciled with the Fifth Circuit's later decision in *Russell*, 193 F.3d 304, in which the court allowed a relator sixty days to file an appeal.

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8. To the extent that the *Rodriguez* court read *Searcy* to hold that the Government can appeal, without intervening, from any determination adverse to the relator, the *Rodriguez* court has read *Searcy* too broadly. *Compare Searcy*, 117 F.3d at 155-156 (Government, without intervening, objected to settlement; the district court overruled the objection; without intervening, the Government appealed from district court's final order approving the settlement) *with Rodriguez*, 522 F.3d at 302 (citing *Searcy* for the proposition that "the Government can appeal an adverse decision even without formally intervening. . . .").

In *Russell*, the Fifth Circuit held that the Government *is* a party for purposes of Fed. R. App. P. 4(a)(1), even though, according to *Searcy*, the Government has no right to appeal from a judgment in an FCA action in which it has not intervened. The Fifth Circuit did not disavow its prior holding in *Searcy*; instead, the Court merely repeated its language from *Searcy* that it was not required to treat the Government as a party for all appellate purposes. 193 F.3d at 307 n.1. The Court did not explain why the Government might need sixty days to decide whether to appeal where, according to the court, the Government had no right to appeal in the first instance.[9]

Less than two months before its decision in *Russell*, however, the Fifth Circuit had dismissed an appeal from a civil contempt order by a defendant in a case in which the United States was the named party because the defendant-appellant filed his notice of appeal more than thirty days after entry of the district court's order. *United States v. Brumfield*, 188 F.3d 303, 306. (5th Cir. 1999). Citing *United States v. Hallahan*, 768 F.2d 754, 756 (6th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986), the Fifth Circuit wrote in *Brumfield*, "This is not a situation in which the United States' participation in [a] contempt holding is in the traditional posture required for that sixty day provision [in Fed. R. App. P. 4(a)(1)(B)] to apply." *See also United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, 291 (5th Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000)("even though the United

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9. The *Russell* Court expressly declined to "join the debate over a relator's standing under Article III," 193 F.3d at 307, a debate which this Court resolved in *Stevens*.

States may be a relevant 'party' in this suit for some purposes of the litigation, the Federal Government certainly is not the acting party-of-record in this suit.").

The Second Circuit's reasoning in this case – that participation and control are indicia of party status – and our position that the Government can be a party for one purpose and not for another – are in line with the Fifth Circuit's holdings in *Brumfield* and *Searcy*. *Russell* is the outlier case in the Fifth Circuit.

The Ninth Circuit's reliance in *Haycock*, 98 F.3d 1100, on cases brought under the Miller Act is misplaced. The Government is a real party, not just a party in interest, under the Miller Act, 40 U.S.C. § 270(a). *United States Fidelity and* Guaranty *Co. v. United States for the Benefit of Kenyon*, 204 U.S. 349, 359 (1907)(United States is real litigant, not a mere nominal party, in cases under the statutory predecessor to the Miller Act).

The only way to harmonize the holdings of those courts which have applied the sixty-day rule to a relator's time to appeal in an FCA action is to find, as did the Third Circuit, that "applying the shorter deadline may confuse litigants who, based on a literal reading of Rule 4(a)(1), assume that the longer deadline applies." *Rodriguez*, 552 F.2d at 302. While the intent of those courts is admirable, it is not a sound basis upon which to interpret a jurisdictional rule like Fed. R. App. P. 4(a)(1).

The Second Circuit correctly rejected the faulty reasoning employed by those circuit courts which applied the sixty-day rule. Followed to its illogical

conclusion, those courts opting for the sixty-day rule would hold that, whenever a court was confronted with a choice of two or more potentially applicable limitations, the court should choose the longer limitation because only in that way would a litigant be able to "to figure out which time period applies, easily, without extensive research, and without uncertainty." *Haycock*, 98 F.3d at 1102. While such a resolution is certainly expedient, it is not a principled basis on which to interpret a statute. Federal court jurisdiction should not be based upon the convenience of the litigants.

The hardship, if any, imposed by applying the thirty-day rule in this case is self-imposed. As the Second Circuit aptly noted, "any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days." As this Court has observed, "filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v. Locke*, 471 U.S. 84, 101 (1985).

Rule 4(a)(1) is a jurisdictional rule. The jurisdiction of the courts of appeals is fixed by Congress, and "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles v. Russell*, 551 U.S. 205, __, 127 S. Ct. 2360, 2363, 168 L. Ed. 2d 96, 102 (2007), citing *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). As such, the jurisdiction of the circuit courts must be limited to the precise

boundaries defined by Congress. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971).[10]

The Second Circuit held that the inclusion of the term of art "real party in interest" in Fed. R. Civ. P. 17(a)(1) and its omission from Fed. R. App. P. 4(a)(1)(B) was deliberate and "meaningful." (Pet. App. 10a) Thus, a proper interpretation of the Rules in this case is that absent intervention or some other affirmative act by the Government, the Government, although a real party in interest in a False Claims Act action, is not a "party" for purposes of determining the Petitioner's time for filing a notice of appeal from a judgment dismissing all four claims alleged in Petitioner's complaint.

Additionally, as the *Russell* court noted,

> The Advisory Committee's Notes of 1946 to Rule 73(a) of the Federal Rules of Civil Procedure, the predecessor of Rule 4(a), explains that the government's institutional decisionmaking practices require more time to decide whether to appeal and that in fairness, the same time should be extended to other parties in a case in which the government is a party. *See* Moore's Federal Practice § 304.11[2], at 304-24 (3d ed. 1997).

193 F.3d at 306. As the Second Circuit held, "this rationale is obviously inapplicable to the present case,

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10. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

where the government has played no role other than to decline to participate in it." (Pet. App. 11a) This rationale is also inapplicable because the Government had no right to appeal from the judgment dismissing Petitioner's complaint for failure to state a claim.

Here, there is a generally applicable thirty-day time period in which to file an appeal, and an exception to that rule for actions in which the Government is a party. "Exceptions from a general policy which a law embodies should be strictly construed." *Spokane & Inland Empire R.R. Co. v. United States*, 241 U.S. 344 (1916).

Moreover, here, absent intervention, the Government had no right to appeal from the district court's judgment dismissing the case pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Accordingly, this Court should affirm the judgment of the Second Circuit which dismissed Petitioner's appeal for lack of subject matter jurisdiction.

C. The Government Bears None of The Indicia Of "Party" Status Prior To Its Intervention

There is no dispute that both the Government and the relator are real parties in interest in an action under the FCA.[11] However, Petitioner's formulation, that "real party in interest" plus the statutory requirement of naming the Government in the caption makes the

11. *But see United States ex rel. Taylor v. Gabelli*, 233 F.R.D. 174, 175 (D.C. 2005)("If the federal government remains a real party in interest when it declines to intervene, what sense is there in Congress providing them with the declination option in the first instance?")

Government a "party" for all purposes begs the question presented.[12]

The naming requirement in § 3730(b)(1) would not be necessary if the Government were a party; Fed. R. Civ. P. 10 and 17 would require that the Government be named in the caption. Furthermore, Rule 10 sets forth the minimum requirements for a caption. It does not prohibit additional names and other information.[13]

Petitioner concedes that the purpose of naming the Government is to ensure that the Government is bound by a judgment in the case. Pet. Brief at 23. That purpose is served by the mere statutory formality of naming the Government. Compliance with the naming requirements of the FCA and Fed. R. Civ. P. 17 does not compel the conclusion that the Government is a party for purposes of determining the relator's time to appeal.

The Government's relationship to an FCA action is *sui generis*. *Rodriguez*, 552 F.3d 297, 301 (Government's relationship to an FCA action is "neither fish no fowl"). However, none of the rights granted to the Government by the FCA compel the conclusion that the Government is

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12. *See Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 162 (N.D. Ga. 1982)("The fact that the suit is brought in the name of the United States is a legal fiction designed to implement the "private attorney general theory underlying the cause of action itself").

13. The full caption in the Rodriguez case is an example of this: *Renee Rodriguez; Barbara King*, *In the Name of the United States Government Pursuant to the False Claims Act, 31 U.S.C. Section 3730, and Individually Pursuant to the New Jersey Conscientious Employee Protection Act v. Our Lady of Lourdes Medical Center.*

a party for purposes of determining the relator's time to appeal.

The Government's rights in an FCA action where it has not intervened are not coincident with the rights ordinarily exercisable by a "party" to an action. The Government's rights where it has not initially taken over the action are broader in some respects and narrower in other respects, than the rights afforded a party in an ordinary action.

Unless it so requests, the Government has no right to be served with copies of any pleadings beyond the initial complaint. 31 U.S.C. § 3730(c)(3). In contrast, Fed. R. Civ. P. 5(a)(1)(B) requires service of all pleadings after the original complaint upon every party.

The Government has no right at all to copies of any discovery papers, written motions or most other notices in an FCA action in which it has not intervened. In contrast, Fed. R. Civ. P. 5(a)(1)(C) requires that any discovery paper which is required to be served upon any party be served upon all parties and Rules 5(a)(1)(D) and (E) require service of written motions and notices on all parties. The Government may not withdraw or settle an action over a relator's objection except upon a judicial determination, after a hearing, that "the proposed settlement is fair, adequate, and reasonable under all the circumstances" (31 U.S.C. § 3730(c)(2)(B)).[14]

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14. Contrary to Petitioner's assertion, 31 U.S.C. § 3730(c)(4), which authorizes the district court to stay discovery "for a period of not more than 60 days," operates in favor of the relator. It imposes a time limit and circumscribes a court's otherwise broad discretion to stay discovery in the interest of justice. *See*, *e.g.*, *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970).

On the other hand, the FCA grants the Government certain rights which a nongovernmental co-party does not have. The Government's rights to unilaterally dismiss or settle an action, subject to notice and a hearing, and its right to veto a relator's dismissal are also not consistent with the rights of a party. It is quite clear that the Government cannot be, as Petitioner contends, a "party" for all purposes.

"The statute draws a sharp distinction between actions brought by the Attorney General under §3730(a) and actions brought by a private person under §3730(b)." *Rockwell International Corp. v. United States*, 549 U.S. 457, 477 (2007). *See also Hughes Aircraft Co. v. United States*, *ex rel. Schumer*, 520 U.S. at 945 n.5 ("a relator's interests and the Government's do not necessarily coincide").

As the Second Circuit wrote,

> what is of import is neither that Eisenstein brought a False Claims Act claim in the name of the United States, nor that the United States may be entitled to a portion of the recovery if Eisenstein prevails; what is of import is that the United States played no role in this matter before the district court.

(Pet. App. 13a) In contrasting this case with *United States v. American Society of Composers, Authors and Publishers*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964), the circuit court noted that the sixty day limit was applied there because the United States actively participated in the litigation. Pet. App. 11a.

American Society of Composers arose under the Expediting Act, 15 U.S.C. § 29, which specifically applies only to antitrust actions "in which the United States is the complainant." In contrast, 31 U.S.C. § 3730(b)(1) provides, in relevant part: "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." "For the person" and "for the United States" does not make the action one brought by the United States, nor does the mere naming of the United States in the caption make the Government the complainant, as was the case in *American Society of Composers. Rockwell International Corp.*, 549 U.S. at 477.

Significantly, petitioner makes no mention of the Government's relationship to the three claims asserted by Petitioner which do not concern the FCA. If the district court had dismissed only the FCA claim, the caption identifying the Government would not change, but one could not reasonably contend that the Government remained a party for Petitioner's personal claims. And, if the district court had dismissed all of the claims except the FCA claim, one could not reasonably contend that the Government had any right to appeal from that judgment unless it was first permitted to intervene "for good cause." Naming the Government in the caption is, as the Second Circuit held, nothing more than a mere statutory formality.

In this case, where the Government has declined to intervene, the plain language of the FCA excludes the Government from an active role in the proceedings unless the Government later moves to intervene "upon a showing of good cause." 31 U.S.C. § 3730(c)(3). As the Second Circuit noted, "The inability to participate without moving

to intervene is simply not consistent with the principal characteristics of being a party to litigation" (Pet App. 8a) for purposes of determining the deadline for a relator to file a notice of appeal.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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